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Responsibility, Respect, Temperance, and Honesty:

Selected State Judicial Discipline Cases in 2018

Cynthia Gray

In 2018, as a result of state disciplinary proceedings, seven judges were removed from office, 25 judges resigned or retired in lieu of discipline and publicly agreed to never serve again, one judge agreed to resign and was publicly admonished, 11 judges were suspended without pay, three judges received cease-and-desist orders, and 84 judges received public censures, reprimands, admonishments, or warnings.¹ Reflecting that the code of judicial conduct requires a judge “to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary,”² the conduct underlying those sanctions related both to performing judicial duties, such as abuse of authority and lack of diligence, and to off-bench activities, such as driving while intoxicated and inappropriate political activity.²

SOCIAL MEDIA

The trend of judges getting into trouble on Facebook that began in 2009 continued through 2018, with several discipline cases illustrating the perils of participating on social-media platforms that judicial ethics advisory committees have warned judges about.

For example, the Arizona Commission on Judicial Conduct publicly reprimanded a judge for mocking a litigant in a Facebook post that purported to be a verbatim account of an eviction proceeding over which the judge had presided and began: “In the category of, You can’t make this stuff up!”³ The post described a maintenance man’s testimony about finding heroin under the bathroom rug in the tenant’s apartment. The tenant testified that the heroin was not his, explaining that cocaine was his drug of choice and he keeps his drugs in a safe. When asked how the heroin got into his apartment, the tenant replied: “I don’t know. Maybe one of the hookers I had in my apartment left it.” The judge’s post ended: “Needless to say, the Court ruled in favor of the landlord.”

When one of his Facebook friends asked if this was a true story, the judge posted: “Yes. It goes without saying but the tenant wasn’t the brightest bulb in the chandelier.”

Based on an agreement, the Kentucky Judicial Conduct

Commission publicly reprimanded a judge for sharing a news story on her Facebook account with the comment: “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.”⁴ The judge’s Facebook account included her title and name.

Even if a post does not use the judge’s title, it may constitute judicial misconduct. The New York State Commission on Judicial Conduct noted that although a judge’s disparaging posts about a private-property dispute did not refer to the judge’s judicial position or mention the litigant by name, “many in his small community would likely know that he is a judge and would recognize the property and individuals involved.”⁵ The litigant, S., had bought property from the estate of the stepfather of the judge’s wife. S. was also the complaining witness in several cases against her domestic partner before the judge and his co-judge.

After someone filed a complaint about the judges’ handling of the cases, the judge posted photographs on his Facebook account, six showing the property before its sale to S. and four showing disarray when S. was in default on the purchase contract. The judge commented: “good [sic] thing mommy and daddy come [sic] through. (if selling do a back ground [sic] check.)” The judge intended the post to be publicly viewable because he was “upset” at S. for repeatedly and publicly accusing him and his co-judge of misconduct and encouraging others to file complaints with the Commission.

The Commission found that the photos and derogatory comments constituted misconduct.

Even if he was provoked by what he perceived as S.’s improper behavior, it was respondent’s obligation as a judge to observe high standards of conduct and to act with restraint and dignity instead of escalating the unseemly public accusations and debate over a private matter that played out on Facebook. Every judge must understand that a judge’s right to speak publicly is limited because of the important responsibilities a judge has in dispensing justice, maintaining impartiality and

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Footnotes

1. See “State Judicial Discipline in 2018,” 40 JUDICIAL CONDUCT REPORTER 4 (NCSC 2019), available at <https://tinyurl.com/y4kf53oq>.
2. Model Code of Judicial Conduct (ABA 2007), Rule 1.2, available at <https://tinyurl.com/y4juj9z6>.

3. Urie, Order (Arizona Commission on Judicial Conduct, June 12, 2018), available at <https://tinyurl.com/y9d9surv>. The judge referred to the individuals by their role in the case, not by their names.
4. In re the Matter of McLaughlin, Agreed order of public reprimand (Kentucky Judicial Conduct Commission, June 12, 2018), available at <https://tinyurl.com/y9jrdlga>.
5. In the Matter of Fisher, Determination (New York State Commission on Judicial Conduct, June 26, 2018), available at <https://tinyurl.com/y94vg3rp>.

acting at all times in a manner that promotes public confidence in the judge's integrity.

RESPONSIBILITY

Several judges were held responsible in 2018 for content posted by others to whom they had delegated the responsibility of maintaining their Facebook pages. For example, the Texas State Commission on Judicial Conduct publicly reprimanded a judge for, in addition to other misconduct, campaign advertisements for other candidates posted on his Facebook page even though he had not authorized the posts and did not know about them until he received the Commission's inquiry.⁶ Similarly, the Texas Commission publicly admonished a judge for Facebook posts advertising a school-supply drive, soliciting donations for an individual, and advertising his donation of a rifle to a charitable raffle. Even though a member of his judicial staff handled his Facebook page, many posts were made without his prior authorization, and he was often unaware of what appeared on his page.⁷

That responsibility extends to judicial candidates and their campaign Facebook pages. For example, the Florida Supreme Court removed a judge from office for criticism of her campaign opponent for representing criminal defendants on a Facebook page that was created by an electioneering-communications organization formed by her campaign consultant.⁸ The Court held that the judge's actions, "individually and through her campaign, for which she was ultimately responsible[,] unquestionably eroded public confidence in the judiciary." The Court emphasized that nothing in the code of judicial conduct permitted a judicial candidate to delegate to a "campaign manager the responsibility for written materials created or distributed by the campaign."

The Nevada Commission on Judicial Discipline publicly reprimanded a former judge for a photoshopped picture of herself and an actor that her campaign manager had posted on her campaign Facebook page, which misled the public that the Rock had endorsed her campaign, and for her subsequent comment on the post: "I'm 'almost' taller than him. Almost."⁹ The Commission found that the judge had failed to take reasonable measures to ensure that her campaign representatives complied with the code of judicial conduct, noting that her contract with her campaign manager did not contain any restrictions on the posting of social-media materials, such as obtaining prior approval from the judge, that the judge did not discuss with campaign representatives the prohibitions in the code, and that the judge failed to supervise her campaign representatives. The Commission reminded judicial candidates that "campaign-related social media platforms, such as Facebook, maintained by a campaign committee or others, do not insulate them from the strictures of the Code."

RE-POSTING

The importance of judges' understanding the technical aspects of the social media they use was highlighted by a case in which a court commissioner told his presiding judge and the California Commission on Judicial Performance that he had taken posts down when that was not true, although the gravamen of the misconduct was the "egregious" posts and re-posts on his Facebook page.¹⁰ In May of 2017, the presiding judge wrote the commissioner that there was a "significant concern" about the "content" of a number of his posts and the "impression" a member of the public might have on viewing them. In a written response, the commissioner stated that he had deleted the posts, had refrained from sharing similar posts, and had "designated my Facebook account as 'private' which means only my friends can view any future posts." In his self-report to the Commission, the commissioner repeated those representations.

However, for at least four months longer, the commissioner's Facebook page remained public, and several of the posts were still on the page. Although the commissioner had tried to change the page to private, his "unfamiliarity with the technology resulted in the changes not taking effect as intended." When he was told that the posts were still public, "the commissioner immediately sought further assistance, deleted the offending posts, and increased the privacy settings on his Facebook profile."

Reproducing screenshots of many of the posts, the Commission decision described at least 45 posts or re-posts that "inherently" undermined public confidence in the judiciary and brought the judicial office into disrepute. The commissioner's page reflected, among other things, anti-immigration sentiment, anti-Muslim sentiment, anti-Native American sentiment, anti-gay-marriage and anti-transgender sentiment, anti-liberal and anti-Democrat sentiment, anti-California sentiment, opposition to then-presidential candidate Hillary Clinton, accusations against President Barack Obama, a lack of respect for the federal justice system, and contempt for the poor. Based on a stipulation, the Commission publicly censured the now-former commissioner and barred him from receiving an appointment of work from any California state court, noting that, because the commissioner had retired, that was the strongest discipline it could impose.

As that case illustrates, judges may be liable not only for their original content on Facebook but also for material they re-post. Similarly, the Texas Commission publicly reprimanded a judge for sharing a "meme" on his Facebook page that featured a pic-

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6. Public Reprimand of Lopez (Texas State Commission on Judicial Conduct, June 6, 2018), *available at* <https://tinyurl.com/ybmfteyn>.

7. Public Admonition of Metts (Texas State Commission on Judicial Conduct, October 3, 2018), *available at* <https://tinyurl.com/yym2gp77>.

8. Inquiry Concerning Santino, 257 So.3d 25 (Florida 2018).

9. In the Matter of Almase, Findings of fact, conclusions of law, and

imposition of discipline (Nevada Commission on Judicial Discipline, October 22, 2018), *available at* <https://tinyurl.com/y865qdxv>.

10. In the Matter Concerning Gianquinto, Decision and order (California Commission on Judicial Performance, August 22, 2018), *available at* <https://tinyurl.com/ydgvulza>.

[T]here is no “meaningful or workable distinction between in-person and written or electronic solicitations.”

ture of retired Marine Corps General James Mattis with the text, “Fired by Obama to please the Muslims, hired by Trump to exterminate them.”¹¹ The judge told the Commission that he thought the meme “showed an interesting contrast” between the two presidents’ attitudes toward General Mattis but that he later realized that he “should not have posted it, because it’s not just about how [he] interpreted it, but how others might.” The reprimand was also for his own posts “railing or

venting” about the intolerance of liberals.

MORE GUIDANCE

Illustrating the need for further guidance on charitable activities and social media, the Washington State Commission on Judicial Conduct admonished two judicial officers for Facebook posts soliciting contributions to nonprofit organizations.¹² In both decisions, the Commission noted that “social media is a relatively new form of communication,” and “the law tends to lag behind technology.” Stating that most judges “are quite conscious that they may not solicit funds for themselves or others in face-to-face encounters,” the Commission concluded that there is no “meaningful or workable distinction between in-person and written or electronic solicitations.” The Commission emphasized that the “prohibition against judicial solicitation of money does not reflect on the worthiness or virtue of the charity or cause” but that “a near blanket prohibition . . . is necessary as it would be impossible to exercise principled distinctions based on the nature of the charity involved, and it would be improper to have a government agency such as a conduct commission make such value choices.”

Thus, the Commission publicly admonished a supreme court justice for two posts soliciting support for nonprofit organizations. The justice’s Facebook page identifies her as a member of the judiciary and, “[i]n Facebook parlance,” is a “government official” page that anyone can access and that no one can “friend.” The justice is actively engaged in the community and uses the page to educate viewers about matters related to the judicial branch; her posts are intended to make the court and judicial officers more accessible and transparent to the public.

On April 22, 2018, the justice posted on her Facebook page:

Join Lifelong for Dining Out For Life on April 26!

On Thursday, April 26, raise your fork for Dining Out For Life! Join Lifelong at one of 90 restaurants in the Greater Seattle Area who are set to donate 30-50% of their proceeds to vital programs that support people facing serious illness and poverty in our community.

(Lifelong is a nonprofit organization that provides recovery assistance for persons suffering from drug abuse and addiction.) Similarly, the justice posted on her Facebook page about a weekly newspaper that employs homeless people and previously homeless people as vendors.

The Commission explained:

While these Facebook posts present no articulable element of coercion, the Commission finds that it is still an abuse of the prestige of judicial office. The prestige is appropriately reserved for the service of the office itself, and not to be used for the individual benefit of the judge or others, regardless how generally good the cause may be.

The justice did not believe her posts rose to the level of a solicitation, but she acknowledged that the Commission is the body charged with enforcing the code and deferred to its determination that the posts were a violation. Recognizing that greater guidance is needed on the increasingly prevalent use of social media, the justice believed the stipulation would provide such guidance and raise awareness of the risks of sharing information on social media that could be construed as solicitations or endorsements.

DISQUALIFICATION

Outside the context of a judicial discipline case, in an interlocutory appeal from the denial of a motion to disqualify in a civil case, the Florida Supreme Court held that, standing alone, a judge’s Facebook “friendship” with an attorney appearing in a case did not disqualify the judge from presiding over a case involving the attorney, the first decision on the issue by any state supreme court.¹³ The Court did not discuss whether a judge should disclose a Facebook friendship with an attorney.

The Court began with the “general principal” that a traditional friendship between a judge and an attorney, standing alone, did not require disqualification, noting that traditional friendship “varies in degree from greatest intimacy to casual acquaintance.” Facebook friendship, the Court found, “exists on an even broader spectrum,” varying “in degree from greatest intimacy to ‘virtual stranger’ or ‘complete stranger.’”

Therefore, the Court held, disqualification was not required: no reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on a judge’s Facebook friendship with an attorney that “in and of itself” provided “no significant information about the nature” of their relationship, indicated only “a relationship of an indeterminate nature” without revealing “the degree or intensity of the relationship,” and did not “signal the existence of a traditional ‘friendship’” much less “a close or intimate relationship.”

The Court disagreed with the reasoning of *Florida Advisory*

11. Public Reprimand of Burkeen (Texas State Commission on Judicial Conduct, February 21, 2018), *available at* <https://tinyurl.com/y9nnywla>.

12. In re Yu, Stipulation, Agreement, and order (Washington State Commission on Judicial Conduct, December 7, 2018), *available at* <https://tinyurl.com/yava9qfm>; In re Svaren, stipulation, agreement,

and order (Washington State Commission on Judicial Conduct, December 7, 2018), *available at* <https://tinyurl.com/yd8drd98>.

13. Law Offices of Herssein and Herssein v. United Services Automobile Association (Florida Supreme Court, November 15, 2018), *available at* <https://tinyurl.com/ybmvpec8>.

Opinion 2009-20,¹⁴ which stated that a judge may not be friends on Facebook with lawyers who may appear before the judge. The advisory opinion itself does not mention disqualification or the appearance of partiality. That advisory opinion had reasoned that, because a judge's Facebook friends may see who the judge's other Facebook friends are, the judge's selection of some attorneys as friends on Facebook and rejection of others and communication of those choices conveys, or permits others to convey, the impression that they are in a special position to influence the judge. Citing advisory opinions from other states and noting that the Florida committee's advice was the minority position, the Court explained that even "traditional 'friendship' involves a 'selection and communication process,' albeit one less formalized than the Facebook process," as people "traditionally 'select' their friends by choosing to associate with them to the exclusion of others" and "traditionally 'communicate' the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension."

In a dissent, one justice argued that, contrary to the premise of the majority, "equating friendships in the real world with friendships in cyberspace is a false equivalency." The dissent explained that a Facebook "friendship" "may reveal far more information regarding the intimacy and the closeness of the relationship," noting that a Facebook friend "gains access to all of the personal information on the user's profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public" Further, the dissent argued, the majority's standard would force a litigant to engage in "impractical and potentially invasive" discovery to determine if there was something more than a mere Facebook "friendship" that could justify filing a motion for recusal. The dissent urged the Court to "at least adopt parameters for judges to follow when engaging with social media" and in determining whether to friend an attorney or disqualify from a case.

One justice filed a concurring opinion to "strongly urge judges not to participate in Facebook." The concurring justice agreed that "'friendship' on Facebook, without more, does not create a legally sufficient basis for disqualification" but argued that "judges must avoid situations that could suggest or imply that a ruling is based upon anything else." Recognizing that Facebook may be the primary means some judges "stay in touch with family members, actual friends, or people with whom they have reconnected after many years," the concurring justice sug-

gested "at the very least," judges should carefully "limit their 'friendships' to cover only such individuals."

SEXUAL MISCONDUCT

It was too early to tell in 2018 whether the #MeToo movement, which began in late 2017, would result in more judges being sanctioned for sexual harassment or similar improprieties. Even if there has been a recent increase in complaints about such conduct to judicial discipline commissions, those matters might still be in the confidential investigation phase, particularly if the allegations are extensive and disputed.

As in every year, in 2018, there were several judges who were publicly sanctioned for sexual misconduct or who resigned while under investigation for such conduct. For example, a former Kansas judge was ordered to cease and desist from offensive and demeaning verbal and/or physical conduct toward female court reporters and other judges and to continue his retirement;¹⁵ a Texas justice of the peace was publicly reprimanded for hiring a woman with whom he had an intimate relationship and making inappropriate comments to her during office hours, in addition to other misconduct;¹⁶ and another Texas justice of the peace was publicly reprimanded for engaging in an intimate relationship with the city's prosecutor.¹⁷ The judges' resignations and agreements not to serve in judicial office again ended investigations of an Indiana magistrate's inappropriate relationships with court employees and attorneys during court hours and on court property¹⁸ and a Texas probate judge's alleged affair with an attorney representing a party in a high-value probate matter before the judge, as described in a magazine article titled "Ardor in the Court."¹⁹

Accepting the parties' stipulation of facts, the Massachusetts Supreme Judicial Court indefinitely suspended a judge without pay and publicly censured him for his sexual relationship with a member of the drug court team.²⁰ The Court noted that there had been no finding, determination, or stipulation about whether there was sexual harassment or discrimination and that it was not addressing that issue. The Court, which does not have the authority to remove judges, provided that its order be delivered to the governor and the legislature. The judge resigned.

For approximately five months, while Tammy Cagle was an active member of the team in the drug court over which the judge presided, the judge and Cagle had sexual encounters in Cagle's home and in the judge's office. The judge used his offi-

"[E]quating friendships in the real world with friendships in cyberspace is a false equivalency."

14. Available at <https://tinyurl.com/y1rw9zm>.

15. Inquiry Concerning Yeoman, Order (Kansas Commission on Judicial Qualifications, February 7, 2018), available at <https://tinyurl.com/y5w253m4>.

16. Public Reprimand of Jasso and Order of Additional Education (Texas State Commission on Judicial Conduct, April 18, 2018), available at <https://tinyurl.com/y8cb39m2>.

17. Public Reprimand of Berry and Order of Additional Education (Texas State Commission on Judicial Conduct, February 21,

2018), available at <https://tinyurl.com/y8xabvtu>.

18. In the Matter of Shoulders, Stipulation and agreement (Indiana Commission on Judicial Qualifications, May 2, 2018), available at <https://tinyurl.com/y8lh7pu7>.

19. Peyton, Voluntary agreement to resign from judicial office in lieu of disciplinary action (Texas State Commission on Judicial Conduct, January 26, 2018), available at <https://tinyurl.com/yd7nlxf8>.

20. In re Estes, Order (Massachusetts Supreme Judicial Court, May 24, 2018), available at <https://tinyurl.com/ybtgguwt>.

"Comments of a sexual nature . . . are inappropriate in any professional setting. . . ."

cial e-mail account to communicate with Cagle to facilitate one of the encounters and to devise a strategy to prevent his family from seeing their text messages. Before or after some of their encounters, they discussed the operation of the drug court generally and one defendant in particular. During their affair, the

judge attempted to mediate problems between Cagle and other members of the drug court team.

Emphasizing that a judge is the leader of the drug court team, the Court stated that it had "no doubt that the Judge's undisclosed sexual relationship with a member of his team raises, at the least, the appearance of inappropriate influence and partiality in his decisions regarding drug court participants and thus puts the integrity of the drug court during his leadership into question." It explained:

Further damaging respect for his office, the Judge used his [chambers] in the court house for at least several of their sexual encounters, reflecting complete disrespect for the dignity and decorum of the court. . . . It is beyond dispute that these egregious, deliberate, and repeated acts of misconduct severely diminished respect in the eyes of the public not only for this judge but also for the judiciary.

Although it noted that the judge's "performance evaluations suggest that he has been a conscientious judge who consistently received very positive ratings from attorneys, court employees, and jurors," the Court concluded: "The Judge's misconduct . . . is serious, and his prior positive evaluations cannot repair the damage to the judicial system caused by his grave, willful, and repeated wrongdoing."

INAPPROPRIATE "JOKE"

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly admonished a judge for responding "nine inches" after a female court clerk stated to him, "I have a question for you" after a court session.²¹ When the clerk expressed shock, the judge acknowledged that his comment was inappropriate.

Shortly thereafter, the clerk disclosed the incident to co-workers. The following week, after being contacted by court administration, the clerk reported the matter to the county human resources department. The human resources manager met with the judge, and the judge acknowledged the impropriety of his comment again, offered to formally apologize to

the clerk, and voluntarily agreed to view an online training course on sexual harassment and discrimination.

In his answer to the Commission's statement of allegations, the judge acknowledged that he made the comment and that it was inappropriate. He explained that he had intended to make a joke to a person he had known for several years and whom he considered a friend but that he realized the comment was in bad taste and "should not have been made regardless of [the clerk's] subjective opinion of its offensiveness."

The Commission stated:

Comments of a sexual nature, such as the comment at issue here, are inappropriate in any professional setting, and particularly so when the speaker holds such a disproportionately high position of power over the person subjected to the comments. Because of that power disparity, subordinate employees can feel inhibited from reporting such conduct and endure a workplace unsure of when they might again be subjected to it. Respondent's comment detracted from the dignity of Respondent's judicial office.

The Commission noted that the judge's "inappropriate comment appears to have resulted from Respondent being overly casual around court staff and not showing due regard to his role as a judge."

DEMEANOR

As every year, many sanctions in 2018 were for violations of the code requirement that a judge "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity."²² For example, the Texas State Commission on Judicial Conduct publicly admonished a judge for (1) referring to a man who was the subject of a guardianship proceedings as "Mr. Maggot" or "Maggot Man" or words to that effect; (2) comparing the IQ of a woman who was the subject of a guardianship proceeding to the IQ of a pen; and (3) interacting with litigants in three guardianship cases in a manner that reasonably led them to feel disrespected, demeaned, and frustrated.²³

Injudicious demeanor was one of the grounds for which the New York Court of Appeals removed two judges.

The Court removed one judge for (1) striking witness testimony and dismissing petitions in two cases because counsel reflexively kept saying "okay"; (2) on numerous occasions, acting impatiently, raising his voice, and making demeaning and insulting remarks to attorneys, often in open court; (3) awarding counsel fees without providing an opportunity to be heard, contrary to applicable rules; and (4) failing to cooperate with the Commission.²⁴

21. In re Kathren, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct, December 7, 2018), available at <https://tinyurl.com/y7xhvk5>.

22. Model Code of Judicial Conduct (ABA 2007), Rule 2.8(B), available at <https://tinyurl.com/y4juj9z6>.

23. Public Admonition of Cross and Order of Additional Education (Texas State Commission on Judicial Conduct, April 18, 2018),

available at <https://tinyurl.com/y823b7kg>.

24. In the Matter of O'Connor, 112 N.E.3d 317 (New York 2018). The Court's decision was based on the determination of the State Commission on Judicial Conduct. In the Matter of the O'Connor, Determination (New York State Commission on Judicial Conduct, March 30, 2018), available at <https://tinyurl.com/y9e73pfq>.

For example, during direct examination in a non-jury trial, when Pamela Smith, who represented the landlord/petitioner, said “okay” after her witness’s answers, the judge told her to “stop telling [the witness] his answers are okay”; Smith apologized. Shortly thereafter, Smith again said “okay” after some of her witness’s answers, and the judge again told her to stop, and Smith again apologized.

The next time Smith said “okay” after her witness’s answers, the judge interrupted her for a third time and told her to “[s]top telling [the witness] his answers are okay.” Smith apologized again and explained that it was a “reflex.” The judge said it was not a reflex because she did not do it all the time, warned that he would strike the testimony and dismiss the case the next time she did it, and asked, “Do we understand each other?”

When Smith said “okay” after the very next answer, she caught herself and immediately apologized. Nevertheless, the judge *sua sponte* excused the witness, telling Smith, “the testimony is stricken because you clearly were leading him by telling him periodically that his answers were okay. And that’s totally unacceptable.”

Smith called another witness and said “okay” after the witness’s response to her first question. The judge told her, “That’s once. Next time —.” When Smith said “okay” a short time later, the judge struck the testimony of her second witness. After Smith said she had no other witnesses, the judge granted opposing counsel’s motion to dismiss for lack of evidence. The dismissal meant Smith’s client had to restart the case, and he lost approximately \$90,000 as a result.

In several other non-jury trials, the judge made comments to attorneys such as:

- “[You and I] have probably a different idea of how a professional conducts themselves.”
- “[You have] no idea what you’re doing,” and “Apparently, there’s a lot you don’t understand.”
- “You don’t have to sarcastically say thank you every time I make a ruling, okay counsel? . . . I don’t see any other way to take it, counsel . . . It’s obviously clear.”
- “Maybe you should do something right for a change instead of just apologizing all the time okay, counsel?”
- “Is there some course in law school now, how to be discourteous and how to be rude? Because if there is, you must have gotten an A in it.”
- “I’m glad you think it’s funny . . . No wonder people think lawyers are a disgrace. It’s people like you who give them that impression.”

The judge argued that his courtroom demeanor “was justified by the circumstances, including the ‘rough and tumble’ nature of landlord-tenant litigation.” Disagreeing, the Court explained:

[T]he need to maintain order must be counterbalanced against a judge’s obligations to remain patient and to treat

those appearing before the court with dignity and courtesy As we have explained, “respect for the judiciary is better fostered by temperate conduct, not hot-headed reactions”

LACK OF RESPECT

The New York Court of Appeals removed a second judge for (1) making discourteous, insensitive, and undignified comments before counsel and litigants in court; (2) driving while intoxicated, being discourteous to and seeking preferred treatment from the arresting officers, violating the terms of her conditional discharge, and going to Thailand without notice to the court, resulting in the revocation of her conditional discharge; and (3) failing to disqualify herself from the arraignment of a former client and attempting to have his case transferred in a manner that she thought might benefit him.²⁵

For example, the judge learned one day from her clerk that an in-custody defendant the judge was scheduled to arraign was biting, spitting, cursing, kicking, and punching sheriff’s deputies, and using racial slurs while being transported to the court. While awaiting the case, the judge said from the bench to a sheriff’s deputy, “I heard she’s going crazy,” and “Well, tase her”; “Shoot her?”; “What do you do, billy-club people?”; “Well, punch her in the face and bring her out here. You can’t take a 16-year-old?”; “What do you want me to do, leave her? I don’t like her attitude”; “She needs a whoopin’”; and “Is she crazy or is she bad?”

Another day, the judge arraigned a defendant charged with disorderly conduct for intentionally blocking traffic by walking in the middle of the road. Before accepting his plea, the judge told the defendant to “stay out of the street. It’s super annoying. I hate when people walk in front of my car. If there was [sic] no rules, I would totally run them over because it’s disrespectful.”

Another time, the attorney for a man charged with misdemeanor sexual misconduct objected to an order of protection in favor of the alleged victim, referred to the alleged victim’s three-week delay in signing a statement against D.W., and stated, “It appears to me to be a case of buyer’s remorse.” The judge laughed and told the assistant district attorney, “That was funny. You didn’t think that was funny.” A minute or two later, following D.W.’s arraignment, the judge stated: “Oh, man. I don’t mean to be so inappropriate. I thought that was freakin’ hilarious. . . . She [referring to the prosecutor] didn’t think it was funny. . . . She was offended. I thought it was hilarious.”

The Court held that the judge’s repeated failure to speak in a dignified manner with defendants, sheriff’s deputies, and attorneys demonstrated a lack of “respect toward everyone who appears in a court.”

“[R]espect for the judiciary is better fostered by temperate conduct, not hot-headed reactions”

25. In the Matter of Astacio, 112 N.E.3d 851 (New York 2018). The Court’s decision was based on the determination of the State Commission on Judicial Conduct. In the Matter of Astacio, Determination

(New York State Commission on Judicial Conduct, April 23, 2018), available at <https://tinyurl.com/ycw2ngqk>.

**The judge's
conduct was
"sufficiently
disruptive and
disconcerting"**

• • • •

ATTEMPTS TO INFLUENCE

In 2018 the New Jersey Supreme Court had three cases involving judges who had improperly used the prestige of their office to try to influence official action in their favor or in favor of a friend.

- In *In the Matter of Wright*, the Court publicly reprimanded a judge who had involved herself in the scheduling and processing of a friend's custody case.²⁶
- In *In the Matter of Palmer*, the Court publicly censured a judge (a harsher sanction than reprimand) for identifying himself as a judge to court personnel when discussing his own family law case.²⁷
- In *In the Matter of DeAvila-Silebi*, the Court removed a judge who had involved herself in a former intern's custody dispute.²⁸

(The Court's orders do not describe the judges' misconduct; this discussion is based on findings by the Advisory Committee on Judicial Conduct or a three-judge panel.)

The imposition of three different sanctions in cases involving violations of the same rules is attributable in part to differences in the nature and extent of the misconduct.

Judge Wright had escorted a friend seeking temporary custody of his grandson to the court's intake office, talked to court personnel to ensure her friend had the right forms, asked the judge on emergent duty about the schedule, and then told a staff member that her friend could return on Monday.

Judge Palmer had appeared at the Somerset County Courthouse, identified himself several times as a judge from Ocean County, and asked about how to emancipate his child and how to lower his child support payments. He spoke in succession to a clerk, a caseworker, a senior probation officer (after the caseworker asked for assistance), and the senior probation officer's supervisor (after the senior probation officer asked for assistance). When talking to the caseworker's supervisor, for example, the judge referred to his lack of a pay raise, remarking "you the tax payers decided that a long time ago." The judge's conduct was "sufficiently disruptive and disconcerting" that a supervisor told the Somerset County assignment judge, who reported the incident to the Ocean County assignment judge.

Judge DeAvila-Silebi called the police the day before Mother's Day, identified herself as the emergent duty judge, and told a sergeant she wanted an officer to accompany a mother to retrieve her child. The police department dispatched an officer with the mother to the home of the child's paternal grandmother; the officer took the five-year-old boy from his

grandmother and returned to police headquarters with the child and the mother, after which the mother left with the child. Judge DeAvila-Silebi also "demonstrated dishonesty, perversion of her judicial authority and betrayal of the public trust" by making numerous misrepresentations to the police department. For example, contrary to what she told the police sergeant, she had not received a phone call from an attorney, no emergent application had been filed, and she had not seen the court order regarding parenting time.

Probably the biggest contrasts between the three cases that justified escalating sanctions from reprimand to censure to removal were the aggravating and mitigating factors.

In *Wright*, there were no aggravating factors justifying more than a reprimand, and the mitigating factors included the judge's sincere remorse and contrition, which had demonstrated to the Committee that the likelihood of her repeating the misconduct was "nearly nonexistent."

In *Palmer*, the Committee concluded that "enhanced discipline" was justified because this was the third time in three years that the judge had been the subject of discipline. In mitigation, the Committee noted that that the judge had not intended to influence the court staff he spoke to and "there was no indication that they were actually influenced."

In contrast, in *DeAvila-Silebi*, during the disciplinary proceedings, the judge "not only failed to acknowledge her wrongdoing or express remorse or contrition" but "displayed additional dishonesty and transcended her right to present a defense." The panel emphasized that the judge's "'disturbing' decision to perpetuate a defense without any 'compunction about being less than credible' as the investigation of her conduct continued, 'evidence[s] that [she] lacks the honor and integrity demanded of a judge.'"

PRESTIGIOUS PROMOTIONS

There are numerous judicial ethics advisory opinions on whether and to what extent judges may use their judicial titles to promote permitted extra-judicial activities such as writing books.²⁹ If they had sought an opinion or at least reviewed existing advice, two judges may have avoided sanctions for misuse of their positions in 2018.

The Illinois Courts Commission publicly reprimanded an appellate judge for soliciting paid speaking engagements using his judicial position, finding he not only lent the prestige of office to advance his private interests, but exploited his judicial office in financial and business dealings, engaged in financial and business dealings with persons likely to come before his court, and played an active role in managing a business.³⁰ The Commission stated that it was not finding that the judge's misconduct was willful but noted it was "frankly puzzled" that he had never sought guidance from available

26. In the Matter of Wright, 194 A.3d 495 (New Jersey 2018), adopting the presentment of the Advisory Committee on Judicial Conduct, available at <https://tinyurl.com/y7xgg3zf>.

27. In the Matter of Palmer, 196 A.3d 579 (New Jersey 2018), adopting the presentment of the Advisory Committee on Judicial Conduct, available at <https://tinyurl.com/y7gcb8qb>.

28. In the Matter of DeAvila-Silebi, 194 A.3d 497 (New Jersey 2018),

based on the report of a three-judge panel, available at <https://tinyurl.com/ybmq3fal>.

29. See, e.g., U.S. Advisory Opinion 114 (2014), available at <https://tinyurl.com/y3t8jhgl>. See also Gray, "The Judge as Author," 35 JUDICIAL CONDUCT REPORTER 1 (spring 2013).

30. In re Steigman (Illinois Courts Commission, August 13, 2018), available at <https://tinyurl.com/y9u3gkxt>.

sources such as “prior decisions of this Commission (some of which relate to the conduct of business by judges) and the excellent advisory opinions produced by the Illinois Judges Association’s committee on judicial ethics,” several of which were on relevant topics.

The judge testified that he had been writing and speaking on legal topics for decades to share his love of the law and to educate the public. He began soliciting paid speaking opportunities after an organizer of continuing legal education seminars for prosecutors offered to pay him \$1,250 for a two-day presentation. The judge’s income was \$32,000 to \$34,000 for over 24 presentations over two years.

The judge made over 120 solicitations. The judge used judicial letterhead for most of his solicitations to law enforcement groups. The judge initially sent solicitations to medical societies and hospitals by his work e-mail but switched to judicial letterhead after the response to the e-mail solicitation had been “tepid.” If he did not receive a response, he sometimes followed up by telephone. He had his secretary assist him with the letters and e-mail solicitations by dictating them for her to transcribe as he would any other correspondence. He paid all the postage for the letters himself.

Noting that the code prohibits judges from soliciting donations for charitable organizations, the Commission stated that, “[t]he same principles apply with even greater force when the ‘cause’ for which the judge is soliciting is a business or commercial activity that serves the judge’s own financial benefit.” The Commission found that the judge’s use of stationery and other judicial resources to advance his “burgeoning speaking business was an exploitation of his judicial office” It explained:

Respondent pursued the opportunity to give paid presentations on the law with energy, using judicial letterhead stationery to increase the likelihood of a positive response to his solicitations and making follow-up calls to recipients who had not responded. Respondent’s zeal in this pursuit arose primarily from his genuine belief that he was providing a public benefit by explaining legal concepts to non-lawyers. Nevertheless, while his motives may have been pure, the fact that the “public service” he was providing also enriched him financially created the danger that recipients of his solicitation might feel coerced to hire him, or might think that hiring him to give a presentation would cause him to favor their interests in cases that came before him.

The Commission agreed that merely being paid to speak or teach may not constitute actively managing a business and emphasized that it was not criticizing or trying to inhibit the practice of judges educating the public regarding the law. However, it concluded that, by directly soliciting paid speaking engagements and following up to urge reluctant recipients to hire him, the judge “went beyond simply earning a fee for per-

mitted activity, and instead actively sought to increase his extrajudicial sources of revenues.”

PROJECT PROMOTION

A Special Court of Review appointed by the Texas Supreme Court publicly admonished a judge for referring to his judicial title and position to promote a project that included a book, website, and an online referral service.³¹ The judge and his wife, an attorney who conducts mediations in family law cases, co-authored the book *Divorce in Peace: Alternatives to War from a Judge and Lawyer*. The book’s front cover lists “John and Laura Roach” as authors. The back cover has a photo of the authors together, next to the statement: “John and Laura have spent their careers, as lawyers and a judge, trying to help couples avoid the pitfalls of high conflict divorces.” An “About the Authors” section describes John Roach as “a Texas district court judge with a true passion for the law” and states that, “[a]s a judge, he has had a front row seat to over 10,000 family law cases.” The book’s text does not refer to “Judge John Roach” or “Judge Roach,” but the book has sections titled “Judge’s Perspective” and “Mediator’s Perspective” that offer additional comment on particular topics.

The book’s introduction refers to the “attorneys, financial planners, mental health professionals and others who are committed to the same principles of peaceful resolution” and “are listed at our website, www.divorceinpeace.com.” Professionals could be listed on the website without charge with a photo, resumé, practice-area description, and e-mail address. Professionals who chose a subscription option, which ranged from \$59.99 a month to \$199 a month, could post additional information such as client reviews, blog posts, articles, and videos.

When the book was published, a brochure was mailed to approximately 18,000 recipients, including about 12,000 Texas attorneys listed with the State Bar as family law practitioners. The brochure repeated the website address several times and described the benefits for attorneys who paid fees to subscribe to the network.

A series of promotional videos were made for the project. For example, in one video, titled “About Us,” the judge and his wife were featured with a picture of a gavel; the judge discussed his expertise as an elected state district court judge who has presided over 10,000 family law cases. The judge decided not to use the videos after viewing them because he was concerned that portions may violate the canons. However, the videos were available on the website for approximately 30 days and were still accessible on YouTube as of May 2018. According to the judge, he had been unsuccessful in his repeated efforts to remove the videos from YouTube because he did not have the necessary user name and password and could not

The judge initially sent solicitations to medical societies and hospitals by his work e-mail . . .

31. In re Roach, Judgment and public admonition (Texas Special Court of Review, July 24, 2018), *available at* <https://tinyurl.com/y4j7gpo>.

obtain the information from the production company in India that had helped to create the videos.

Describing a spectrum, the court explained that, at one end, “are plainly impermissible situations involving a judge who directly uses his or her authority over litigants to coerce actions that will benefit the judge financially.” At the other end of the spectrum, the court stated, “judges are permitted to write and publish books on legal and non-legal topics; identify themselves as judges in biographical descriptions; and sell books they have written so long as they do not exploit the judicial title in doing so.”

The court concluded that “[t]his case falls in the middle of the spectrum” because the judge did not direct “coercive conduct towards litigants or attorneys appearing in his court to compel actions from which he stood to benefit financially” but the “circumstances involve more than individual sales of a law-related book written by a judge.” The court acknowledged that there was no reference to the judge as “Judge John Roach” or “Judge Roach” in the book or in the referral service brochure and no evidence the judge was photographed in his robe in connection with the book and website. However, it stated that his “judicial role is readily apparent based on the first eight words of the book’s ‘About the Authors’ section” and “[l]ittle effort is required for readers to discern that the ‘Judge’ referenced on the front and back covers is John Roach, and that the ‘Judge’s Perspective’ highlighted throughout the book comes from him.” The court described the project as “structured to create a financial gain arising from attorneys who paid for subscriptions in hopes of being hired by readers who acted on the book’s multiple invitations to visit the website and find Divorce in Peace-affiliated attorneys.” The court concluded that the judge’s “participation in aspects of this interconnected project” improperly exploited his judicial position in business activities.

CONCLUSION

Many judicial discipline cases each year involve a pattern of egregious behavior aggravated by lack of remorse that most judges have trouble imagining. Other cases, however, start with a small slip or blind spot that judges may find uncomfortably

more relatable. To ensure their ethics radars are sufficiently sensitive, judges should re-read the code of judicial conduct at least annually, take advantage of the resources of their state judicial ethics advisory committees, and review information from other states as ethical standards are the same in significant respects across the country. For example, every quarter, the Center for Judicial Ethics of the National Center for State Courts publishes the online *Judicial Conduct Reporter*, with articles on recent cases and advisory opinions and analysis of issues such as “Judicial ethics and jurors” and “A judge’s discretion to report criminal conduct” (both in the spring 2019 issue);³² “Consensual sexual relationships between judges and court staff”; “Pornography at the courthouse”; and “Vouching for pardon, parole, or clemency” (from the fall 2018 issue).³³ The Center also has a blog with posts every Tuesday on new cases, advisory opinions, or other developments, and Throwback Thursdays, with summaries of discipline cases from 25, 20, 10, and 5 years ago.³⁴ Reading about others’ missteps may help judges navigate ethically when almost everything they do has the potential for a cringe-worthy headline.



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She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the *Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

32. 41 JUDICIAL CONDUCT REPORTER 1 (spring 2019), available at https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Spring_2019.ashx. The *Judicial Conduct Reporter* is published every quarter electronically, and current and past issues of the *Reporter* are available online as a free download at <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx>.

You can sign up to receive notice when a new issue is available at <http://www.ncsc.org/newsletters>.

33. 40 JUDICIAL CONDUCT REPORTER 3 (fall 2018), available at https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Fall_2018.ashx.

34. See <https://ncscjudicialethicsblog.org/>.